



July 19, 2001

Mr. John M. Hill  
Cowles & Thompson  
901 Main Street, Suite 4000  
Dallas, Texas 7522-3793

OR2001-3138

Dear Mr. Hill:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149622.

The Town of Addison, (the "city"), which you represent, received requests for copies of airport activity reports, marketing reports, rent rolls, and management reports provided to the city by the private manager of the city's airport for January, February, March, and April of 2001. One requestor also seeks copies of all leases entered into by the city for airport property since January 1, 2001. You inform us that the requestors agreed to exclude from their original requests information that concerned private parties, but that the requestors subsequently re-requested the information they had earlier agreed to exclude. You claim that this information is excepted from disclosure under sections 552.101, 552.103, 552.104 and 552.110 of the Government Code. In addition, you assert that the city notified those entities whose proprietary interests might be implicated by the request of their right to submit comments to this office pursuant to section 552.305 of the Government Code.<sup>1</sup> We received no comments from third parties. Thus, we have considered the exceptions you claim and reviewed the submitted representative samples of information.<sup>2</sup>

---

<sup>1</sup>See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances)

<sup>2</sup>We assume that the "representative samples" of records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). Upon review of the information in submitted Exhibit A which you seek to withhold under section 552.104 and your arguments against disclosure, we conclude you have not demonstrated how release of the information would cause competitive harm to the city. Therefore, the requested information may not be withheld under section 552.104.

You seek to withhold the lease agreement contained in Exhibit A pertaining to the "west side hanger" under sections 552.103 and 552.110. We note that section 552.022 of the Government Code makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022 now states in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category of expressly public information under section 552.022 is "information in an account, voucher or contract relating to the receipt or expenditure of public or other funds by a governmental body." Gov't Code § 552.022(a)(3). The submitted lease agreements in Exhibits A and C are subject to section 552.022(a)(3). Therefore, as prescribed by section 552.022, the lease agreements must be released to the requestor in their entirety unless they are confidential under other law.

You argue that the lease contained in Exhibit A is excepted from disclosure under sections 552.103 and 552.110. Section 552.103 is a discretionary exception and not "other law" for purposes of section 552.022.<sup>3</sup> Therefore, the lease agreement in Exhibit A may not be withheld under section 552.103. To the extent you are also arguing that the agreements in Exhibit C are also excepted under section 552.103, such leases in Exhibit C are similarly not excepted from disclosure under section 552.103.

---

<sup>3</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

This office has determined, however, that section 552.110 makes information confidential; thus, it is "other law" for purposes of section 552.022. We will therefore address your arguments under section 552.110 for withholding the lease agreements as well as the other financial information contained in Exhibit A. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>4</sup> This office has held that if a governmental body takes no position with regard to

---

<sup>4</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Upon review of your arguments under section 552.110, we conclude that you have not demonstrated that the information you seek to withhold is confidential as either a trade secret under section 552.110(a), or as commercial or financial information under section 552.110(b).<sup>5</sup> Therefore, we conclude that you must release the requested information in Exhibits A and C to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

---

<sup>5</sup>Although you also argue that the requested information is excepted as a trade secret under section 552.101, the appropriate exception for arguing for trade secret protection is section 552.110.

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Pearle".

Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 149622

Enc. Submitted documents

c: Ms. Danya Sammons  
16400 Ledgemont Lane # 603  
Addison, Texas 75001  
(w/o enclosures)

Mr. Bob Huckabee  
Orbitus, Inc.  
14839 Inwood Road  
Addison, Texas 75001  
(w/o enclosures)